No. 84-1258 (19)

Office-Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE RESPONDENT CITY OF ELLENSBURG, WASHINGTON, IN OPPOSITION

Hugo E. Oswald, Jr.*
James A Miller
Margaret A. Pageler

JONES, GREY & BAYLEY, P.S.
36th Floor
One Union Square
600 University
Seattle, Washington 98101
(206) 624-0900

Counsel for Respondent
City of Ellensburg, Washington

*Counsel of Record

April 5, 1985

BEST AVAILABLE COPY

56 RP

QUESTIONS PRESENTED

1. Were purchasers of municipal bonds issued by the Washington Public Power Supply System to finance construction of two electrical power plants deprived of property without just compensation as a result of the decision of the Washington Supreme Court holding that Washington municipalities and public utility districts had no authority to incur financial obligations with respect to the plants and that the bondholders could not require the project participants to bear the loss of their investments under equitable theories of restitution or estoppel?

2. Did the Supreme Court of the State of Washington in two reasoned decisions based upon a consistent application of long-standing Washington state precedent

unconstitutionally deprive bondholders in public electrical power projects of due process by holding that Washington municipal corporations and public utility districts did not have authority to enter into contracts to purchase electrical power project capability?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set forth at pages iii-v of the Petition for Certiorari correctly identify the parties to this litigation.

This Brief in Opposition to Petition for Certiorari is submitted by the Respondent City of Ellensburg, Washington, one of 88 municipalities, public utility districts, irrigation districts, and rural electric cooperatives which are parties to the Participants' Agreement which is the subject of this litigation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	3
JURISDICTION	3
STATEMENT OF THE CASE	4
Introduction	4
Summary of Proceedings	6
The Participants Did Not "Repudiate" Their Project Obligations	9
The Respondent City of Ellensburg Did Not "Repudiate" the Participants' Agreement . .	13
The Participants Did Not Cause Termination of WNP 4 and 5 . . .	17
The Participants Have Not Wrongfully Retained Bondholder Funds or Assets	19
The Decision Below Has Had No Substantial Effect on the Municipal Bond Markets	20

Page

REASONS FOR DENYING THE WRIT 23

1. The Washington Supreme Court's Decision Is Based Solely Upon State Law 24

2. The Petitioners Have Not Raised a Substantial Federal Question Under the "Takings Clause" . . . 30

3. The Petitioners' Assertions That They Have Been Denied Due Process Are Without Substance 36

A. The "Control" Issue 37

B. Availability of Declaratory Judgment Action 40

C. Recusal of Washington Supreme Court Justices . . 41

CONCLUSION 45

TABLE OF AUTHORITIES

CASES: Page

Armstrong v. United States, 364 U.S. 40 (1960). 36

Board of Commissioners v. All Taxpayers, Property Owners, and Citizens, 360 So. 2d 863 (La. 1978) 27

Borgens v. Ellensburg, Kittitas County Superior Court Cause No. 23263 11,15

Chehalis County v. Hutcheson, 21 Wash. 82, 57 Pac. 341 (1899) 34

Chemical Bank v. Washington Public Power Supply System, 99 Wn.2d 772, 666 P.2d 329 (1983) ("Chemical Bank I") . . . . . passim

Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984) ("Chemical Bank II") . . . . . passim

Chemical Bank and Washington Public Power Supply System v. Asson, 670 P.2d 839 (Idaho 1983), cert. den., ____ U.S. _____, 105 S. Ct. 219 (1984) 11,28

Page

Columbia Rural Electric Assoc., Inc. v. Washington Public Power Supply System, Lewis County, Washington, Superior Court Cause No. 40202 (1982) 11

DeFazio v. Washington Public Power Supply System, 296 Ore. 550, 679 P.2d 1316 (1984) 11

Frank v. Cody, 572 P.2d 1106 (Wyoming 1977) 28

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 29

Herb v. Pitcairn, 324 U.S. 117 (1954) 3

Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976) . . 28

In re New Mexico Natural Gas Anti-trust Litigation, 620 F.2d 794, 796 (10th Cir. 1980) 43

Johnson v. Piedmont Municipal Power Agency, 287 S.E.2d 476 (S.C. 1982) 27

Nelson, et al., v. Ellensburg, Kittitas County Superior Court Cause No. 23398 16

Penfold v. Fall River Rural Electric Cooperative, Inc., Teton County, Idaho, District Court Cause No. 1915 (1982) 11

Page

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 31

State ex rel. Grimes, County Taxpayers Association v. Texas Municipal Power Agency, 565 S.W.2d 258 (Tex. Civ. App. 1978) 28

State ex rel. Mitchell v. Silkeston, 555 S.W.2d 281 (Mo. 1977) 27

State ex rel. O'Connell v. Engen, 60 Wn.2d 52, 371 P.2d 638 (1962) . . 14

State v. O'Connell, 83 Wn.2d 797, 523 P.2d 872 (1974) 35

Town of Othello v. Harder, 46 Wash. 747, 284 P.2d 1099 (Wash. 1955) . . . 26

United States v. Will, 449 U.S. 200 (1980) 44

Webbs' Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) . . 31

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V, cl. 4 30

Wash. Const. art. I, § 1, art. XI, § 10 26

STATUTES

28 U.S.C. § 455 42,43

	Page
28 U.S.C. § 1257	3
Wash. Rev. Code § 7.24	41
Wash. Rev. Code § 7.25	41
Wash. Rev. Code § 35.92.050	41
RULES	
Sup. Ct. R. 17.1	3
OTHER AUTHORITIES:	
Trautman, Legislative Control of Municipal Corporations in Washington, 38 Wash. L. Rev. 743 (1963)	26
"1983: The Year of Default: 'Barefoot Among the Barracudas'," The Weekly (Seattle, Washington), December 19, 1984	22

No. 84-1258

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE RESPONDENT CITY OF ELLENSBURG, WASHINGTON, IN OPPOSITION

Respondent City of Ellensburg, Washington, respectfully prays that this Court deny the Petition for Certiorari submitted by Chemical Bank and the Washington Public

Power Supply System seeking review of the decision of the Supreme Court of the State of Washington in Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984) ("Chemical Bank II"), Appendix A to the Petition for Certiorari.

Respondent City of Ellensburg also respectfully prays that this Court deny the Petition for Certiorari submitted by Petitioners Fredric Haberman, Claude Purvis, Nerow Cheng, Ted R. Pape, Audrey L. Moss, and John H. Biggs seeking review of that portion of Chemical Bank II denying their motion to intervene in Chemical Bank II.[1]

---

1 Although the Haberman petitioners have asked the Court to consider their Petition for Certiorari only if certiorari is granted in the primary case, No. 84-1258, Respondent City of Ellensburg respectfully prays that this Court deny the Haberman Petition for Certiorari, regardless of the disposition of the present case, on the grounds that no substantial federal question is presented by Haberman. The City of Ellensburg adopts and incorporates by reference the Brief of Washington Public Utilities Group in Opposition to Petition for Certiorari filed in No. 84-1414.

OPINIONS BELOW

The recitation at pages 1-2 of the Petition for Certiorari is a generally accurate summary of the proceedings below.

JURISDICTION

The Respondent City of Ellensburg disagrees with the statement of jurisdiction at page 2 of the Petition. Certiorari will be granted to review the decision of a state's highest court only where (1) the state court decision does not rest on state law grounds adequate to sustain the decision; (2) the federal questions for which review is sought have been duly raised and adjudicated before the state court and are substantial; and (3) there are special and important reasons compelling this Court's review of the case. Herb v. Pitcairn, 324 U.S. 117 (1954); 28 U.S.C. § 1257; Sup. Ct. R. 17.1.

Despite the Petitioners' best efforts to couch its dissatisfaction with the

decision below in language resembling that of federal constitutional issues properly within this Court's jurisdiction to consider, no federal question of substance is presented by this case. The decision below is based squarely on an application of Washington state law.

Further, there are no special and important reasons compelling this Court's review. Contrary to the assertions of Petitioners and the amici, this case has had no significant effect on the national municipal bond markets or on the ability of municipalities in the Pacific Northwest to raise funds through municipal bond offerings.

STATEMENT OF THE CASE

Introduction

The Statement of the Case contained in the Petition for Certiorari does not accurately characterize either the proceedings below or the facts of this case.

For example, contrary to Petitioners' very first assertion in their Statement of the Case, this case does not arise from a municipal bond default. The default by the Petitioner Washington Public Power Supply System (the "Supply System") on municipal bonds it issued to construct two nuclear power plants, WNP 4 and 5, occurred as a consequence of the holdings in this case. The default occurred during the pendency of this case and as a result of decisions in this case and in related cases which hold that the Participants' Agreement between the Supply System and the 88 participants who had contracted to purchase portions of the electrical power capability of WNP 4 and 5 were not enforceable.

Similar mischaracterizations of pertinent facts occur in other parts of the Petition. These inaccurate statements are the result of the Petitioners' attempt

to cast this case, decided solely on state law grounds, as one involving substantial issues of federal law.

Summary of Procedings

Construction of WNP 4 and 5 was commenced by the Supply System in 1977 after it sold varying portions of the electrical power capability of the projects to each of 88 consumer-owned utilities pursuant to the terms of the Participants' Agreement dated July 14, 1976. Under the Participants' Agreement, the 88 participants each agreed to pay the Supply System for a specified portion of the project capability of WNP 4 and 5 without regard for whether the plants ever produced any power (the "hell or high water" or "dry hole" provisions of the Participants' Agreement).

Construction of WNP 4 and 5 was funded by the Supply System's sale of 14 issues of municipal bonds between March,

1977, and April, 1981. Because of delays, cost increases, and escalating interest rates--factors which plagued the whole nuclear industry in the late 1970's--it became increasingly difficult to finance the projects. Further, as projected costs escalated, it became clear that the regional market for power would not materialize. See Petition at 7.

On January 22, 1982, with the concurrence of the participants, the Supply System terminated WNP 4 and 5. In May, 1982, Petitioner Chemical Bank, the bondholders' trustee, commenced this suit in the Superior Court for King County, Washington, seeking to determine the WNP 4 and 5 participants' obligations of the 88 participants to make payments to the Supply System pursuant to the terms of the Participants' Agreement.

On June 15, 1983, the Washington Supreme Court issued its first decision in this suit, Chemical Bank v. Washington

Public Power Supply System, 99 Wn.2d 772, 666 P.2d 329 (1983) ("Chemical Bank I"), Appendix B to the Petition for Certiorari. The Washington court ruled in Chemical Bank I that the Participants' Agreement was ultra vires and therefore unenforceable with respect to the Washington municipalities and PUDs and remanded the case to the trial court for further proceedings. On July 22, 1983, the Supply System defaulted on the bonds it had issued to finance construction of WNP 4 and 5.

On remand following the decision in Chemical Bank I, the trial court ruled that the Participants' Agreement was also unenforceable with respect to the Oregon and Idaho participants and Washington cooperatives based upon a frustration of purpose theory and denied Chemical Bank's claims that the Participants' Agreement should be enforced against the participants on equitable grounds. The Washing-

ton Supreme Court affirmed these rulings in Chemical Bank II, in which it also confirmed its ruling in Chemical Bank I that the Participants' Agreement was ultra vires with respect to the Washington municipal participants.

The Participants Did Not "Repudiate" Their Project Obligations.

Petitioners' repeated assertions that the participants repudiated their obligations to the Supply System under the Participants' Agreement, Petition at 3, 4, and 8, are incorrect.

The participants are a widely diverse group of consumer-owned utilities. The 88 participants include 9 Washington cities (one of which is the Respondent City of Ellensburg), 19 Washington Public Utility Districts ("PUDs"), 1 Washington irrigation district, 7 Oregon cities, 4 Oregon PUDs, 5 Idaho cities, and 43 rural electric cooperatives.

The responses of the participants to the termination of WNP 4 and 5 were the result of independent judgments made by the elected officers and managers of each participant. These judgments were based upon each participant's analysis of its obligations under the Participants' Agreement and its constitutional and statutory obligations to its constituents and ratepayers.

Upon the termination of WNP 4 and 5 in January, 1982, many participants raised their electrical rates to enable them to pay their obligations to the Supply System under the Participants' Agreement. A number of participants were taken to court by groups of ratepayers who challenged the validity of the Participants' Agreement and sought to enjoin any rate increases

implemented to pay for the terminated projects.[2]

The participants are all required by law to manage their electric utilities in the interests of their ratepayers. The specific powers and authority of the 88 participants vary widely. Some participants sought judicial determination of their obligations under the Participants' Agreement;[3] others supported the Agreement against challenge by the ratepayers.

---

2 E.g., Borgens v. City of Ellensburg, Kittitas County, Washington Superior Court Cause No. 23263 (filed May 26, 1982); Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), cert. den., 105 S. Ct. 219 (1984) (filed August 11, 1982); Penfold v. Fall River Rural Electric Cooperative, Inc., Teton County, Idaho District Court Cause No. 1915 (filed April 7, 1982); DeFazio v. Washington Public Power Supply System, 296 Ore. 550, 679 P.2d 1316 (1984) (filed February 22, 1982).

3 E.g., Columbia Rural Electric Assoc., Inc. v. Washington Public Power Supply System, Lewis County, Washington, Superior Court Cause No. 40202 (filed April 23, 1982). The independence of the participants' actions is further illustrated by the varying responses of the participants to the Petition for Certiorari herein. The participants are not a single united group in this case.

When Chemical Bank brought this action in Washington state court to enforce the Participants' Agreement, many participants chose to require Chemical Bank to prove that the Participants' Agreement was enforceable in order to avoid challenges by ratepayers that payments made by participants to finance WNP 4 and 5 were ultra vires or otherwise improper. The decision of many of the participants to require Chemical Bank to satisfy its burden of proof in the litigation it commenced was not compelled by improper motives. Most participants are obligated to spend funds only as authorized by existing law. The participants, like Chemical Bank, were anxious to obtain a judicial declaration of their obligations under the Participants' Agreement.

The Respondent City of Ellensburg Did Not "Repudiate" the Participants' Agreement.

The City of Ellensburg, Washington, is a third-class city with a population of approximately 12,000. Like all Washington cities, its municipal authority is limited to that granted by the Washington state constitution and by the Washington legislature. Ellensburg operates municipally-owned natural gas and electrical utilities distribution systems. It does not own any electrical generating facilities and is dependent upon the Bonneville Power Administration for its supply of electricity.

As a municipal entity, Ellensburg is charged by Washington state law with management of its electrical utility in the best interests of its ratepayers. Payment of funds by Ellensburg to satisfy unenforceable, invalid, or ultra vires obligations would not only breach the city's duty to its constituents, but also

could subject its officials to personal liability for the wrongful expenditure of municipal or ratepayers' funds. See State ex rel. O'Connell v. Engen, 60 Wn.2d 52, 371 P.2d 638 (1962).

Termination of WNP 4 and 5 in January, 1982, meant that Ellensburg's obligations to the Supply System under the Participants' Agreement could not be funded from the sale of electrical power produced by the projects. On February 24, 1982, Ellensburg began consideration of a 37% increase in its electrical rates primarily to pay Ellensburg's share of the costs of WNP 4 and 5. This increase was adopted on April 19, 1982, as City Ordinance No. 3351.

On May 26, 1982, certain Ellensburg electrical power ratepayers brought suit in the Superior Court for Kittitas County, Washington, to enjoin the collection of the rate increase on the ground that

Ellensburg's obligations under the Participants' Agreement was invalid and unenforceable. Borgens v. Ellensburg, Kittitas County Superior Court Cause No. 23263. Ellensburg moved for dismissal of the ratepayers' suit on the grounds that the same issues were pending before the King County Superior Court in the suit commenced by Chemical Bank on May 18, 1982. The ratepayers' lawsuit was dismissed to permit the King County Superior Court to decide all issues related to enforcement of the Participants' Agreement, including those related to Ellensburg.

During the pendency of Chemical Bank's suit before the Washington state trial and appellate courts, Ellensburg continued to collect the electrical utility surcharge implemented to pay its share of the WNP 4 and 5 costs pursuant to the Participants' Agreements despite continued

ratepayer opposition.[4] Ellensburg placed the funds collected from its rate increase in a special account and later transferred them to an escrow established by the King County Superior Court judge.

Ellensburg acted to assure that it could satisfy its obligations under its Participant's Agreement if they were adjudicated to be proper. At the same time, Ellensburg required Chemical Bank to prove that the city's obligations under the Participants' Agreement were enforceable to protect the city from allegations by its ratepayers that the Participants' Agreement was ultra vires or otherwise unenforceable.

---

4 Ellensburg's imposition of the 37% rate surcharge and the purpose for which the surcharge was imposed were a matter of record in Chemical Bank's lawsuit as early as September, 1982. Indeed, in September, 1982, the Supply System intervened on the side of Ellensburg to help defend against a second ratepayer suit seeking to enjoin Ellensburg's collection of the surcharge. Nelson v. Ellensburg, Kittitas County Superior Court Cause No. 23398.

Ellensburg and the other WNP 4 and 5 participants have not acted out of selfishness or obstinancy in seeking to obtain judicial determination of their obligations under the Participants' Agreement. Petitioners have wrongly characterized the actions of the various participants as an improper "repudiation" of lawful obligations in an attempt to portray the participants as having "unclean hands" and to conceal from this Court the extensive efforts the participants took to resolve the serious legal problems they confronted upon termination of WNP 4 and 5.

The Participants Did Not Cause Termination of WNP 4 and 5.

Petitioners assert that termination of WNP 4 and 5 was "an eventuality that participants could control," Petition at 6, and that "their disapprovals of project financing plans in 1981 spelled

the projects' certain demise," Petition at 7. Yet Petitioners acknowledge that the projects were planned to avert a projected power shortfall in the region and that by mid-1981 "the projected energy demand had not materialized." Petition at 7.

Reduced electrical demand in the Pacific Northwest was an occurrence the participants could not control. By 1981, revised projections of the region's electrical demand made further construction of WNP 4 and 5 no longer feasible, as Petitioners acknowledge. The participants' concurrence in the Supply System's decision to terminate WNP 4 and 5 in 1982 was a responsible effort to limit the impact of the decision made in the mid-1970's to construct the two plants.

The Participants Have Not Wrongfully Retained Bondholder Funds or Assets.

Petitioners repeatedly assert that the participants have "refused to return any portion of the bondholders' funds." Petition at 4, 8. This allegation is unfounded and seriously misleading.

No portion of the bondholders' funds has gone to any participant. All the proceeds of sales of the WNP 4 and 5 bonds issued by the Supply System were paid to the Supply System which is a Washington municipal corporation separate from the participants, formed under Washington statute, RCW 43.52.

The cash assets remaining in the Supply System's possession at the time of default (approximately $25 million), as well as the physical assets of WNP 4 and 5, have been delivered by the Supply System to Chemical Bank, as trustee for the bondholders. If those funds and

assets have not been returned to the bondholders, it is because Chemical Bank has retained them, not because the participants have them.

The Decision Below Has Had No Substantial Effect on the Municipal Bond Markets.

In an apparent attempt to cloak this case with the "special and important reasons" this Court requires of cases it will review by writ of certiorari, petitioners and the amici have presented the court with an extremely exaggerated picture of the effect of the decision below on the national municipal bond market. However, despite widespread initial predictions that the Supply System's default would seriously disrupt the municipal bond market and cause bond offerings by Pacific Northwest municipalities to be shunned or marketable only with burdensome interest

"penalties," the default has had no such effects.

Shortly after the default in July, 1983, the Port of Tacoma, Washington, sold $26 million in municipal bonds to finance port improvements; Pierce County, Washington, the State of Oregon, and the Lake Washington, Washington School District also successfully sold relatively small municipal bond issues. It has been estimated that these entities may have paid 0.25 to 0.50 percent in interest above what would have been required in the absence of the default. In August, 1983, the State of Washington successfully made a general obligation bond offering in which it was estimated its interest "penalty" was 0.46 to 0.50 percent. In a later bond sale by the state, the estimated "penalty" dropped to 0.25 percent. In November, 1983, the Snohomish County PUD, the utility which had the largest

participant's share of WNP 4 and 5, 13.051 percent, successfully made a $200 million bond offering for which it was estimated it paid an interest "penalty" resulting from the Supply System's default of about 0.6 percent.[5]

Those who purchased WNP 4 and 5 bonds sought an attractive tax-free investment. These investors incurred investment risks in purchasing these bonds, one of which was that the WNP 4 and 5 participants had exceeded their lawful authority in entering into the Participants' Agreement. Unfortunately, the risks inherent in that investment were realized and the bondholders have incurred financial losses as a result of the Supply System's default. This

---

5 The statistical data in this paragraph are taken from: "1983: The Year of Default: 'Barefoot Among the Barracudas'," The Weekly (Seattle, Washington), December 19, 1984.

alone, however, does not render this case one suitable for this court's review.

Further, the minimal and diminishing effect on the municipal bond markets, even for WNP 4 and 5 participants, belies the claims by Petitioners and amici that the Supply System's default has seriously disrupted the municipal bond markets. Petitioners' assertions notwithstanding, there are no special and important reasons justifying this Court's review of this case.

REASONS FOR DENYING THE WRIT

The Writ should be denied for the reason that the decision below is based solely on issues of state law. Despite petitioners' best efforts to weave a federal constitutional argument from a unique combination of the Takings and Due Process Clauses of the federal constitution, the essence of their Petition simply

is that they believe that the Washington Supreme Court wrongly decided this case and that this Court should exercise its discretionary jurisdiction to reverse the decision of the Washington court based on Washington law.

The policies embodied in the concept of federalism, the statutes governing this Court's jurisdiction, and this court's own rules wisely preclude this Court's review of this case because it was decided solely upon state law grounds and does not violate any federal constitutional rights of the Petitioners.

1. The Washington Supreme Court's Decision is Based Solely Upon State Law.

The Washington Supreme Court decision declaring the Participants' Agreement to be unenforceable is based solely upon state law. The determinative element of the decisions in both Chemical Bank I and

Chemical Bank II is the court's careful analysis of the statutory authority of Washington state municipalities and PUDs to enter into the Participants' Agreement. This issue directly involved 28 of the 88 participants in WNP 4 and 5: 9 Washington cities, including the City of Ellensburg, and 19 Washington PUD's (collectively the "Washington municipal participants").

Following its analysis of the authority of the Washington municipalities and PUD's, the court concluded that the Washington municipal participants did not have authority to incur the obligations imposed by the Participants' Agreement. Consequently, the Participants' Agreement was declared to be void and unenforceable against the Washington municipal participants under the ultra vires doctrine

applicable to Washington municipal corporations.[6]

Under Washington state law, the rule that express statutory authority must be found for municipal action arises from the fact that Washington municipal corporations are creatures of the sovereign state. Wash. Const. art. I, § 1, art. XI, § 10. "A [Washington state] municipal corporation, being but a creature of the state, derives its existence, powers, and duties, from the legislative body of the state." Town of Othello v. Harder, 46 Wash. 747, 284 P.2d 1099 (Wash. 1955). This rule is one of long standing in Washington State. See generally Trautman, Legislative Control

---

6 Although the court continued its analysis in Chemical Bank II to determine the effect on the other participants of its decision regarding the Washington municipal participants, that part of the court's decision does not affect the instant Respondent City of Ellensburg and will not be addressed here.

of Municipal Corporations in Washington, 38 Wash. L. Rev. 743 (1963).

The enforceability of municipal contracts containing "hell or high water" or "dry hole" provisions similar to those in the Participants' Agreement, in which the extent of a municipality's obligation is not dependent upon the success of a project, has been considered by a number of state courts. In each such case, the applicable state statutory and constitutional principles have been analyzed to determine the powers and authorities of local municipalities in the respective state.

Contracts containing "hell or high water" or "dry hole" provisions have been held to be enforceable in Board of Commissioners v. All Taxpayers, Property Owners, and Citizens, 360 So. 2d 863 (La. 1978); State ex rel. Mitchell v. Silkeston, 555 S.W.2d 281 (Mo. 1977); Johnson v. Piedmont

Municipal Power Agency, 287 S.E.2d 476 (S.C. 1982); State ex rel. Grimes, County Taxpayers Association v. Texas Municipal Power Agency, 565 S.W.2d 258 (Tex. Civ. App. 1978); and Frank v. Cody, 572 P.2d 1106 (Wyoming 1977). Similar contracts have been held to be unenforceable in Chemical Bank and Washington Public Power Supply System v. Asson, 670 P.2d 839 (Idaho 1983), cert. den., _____ U.S. _____, 105 S. Ct. 219 (1984), as well as in Chemical Bank I and II.

This Court has consistently held that it will not review state court decisions which rest on independent and adequate state law grounds and that it will accept the interpretation of state law by a state's highest court. E.g., Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976). Principles of federalism and comity preclude this court's reviewing decisions

grounded in state law, even if this court might have reached different results on the state law issues. Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

If the Court should grant certiorari in this case, it would open its doors to certiorari petitions in every decision by state courts of last resort in which the enforceability under state law of municipal obligations is at issue. To do this would radically change the role of this Court in matters of local financial control.

The validity of the Participants' Agreement, like that of other municipal obligations, is properly an issue to be determined by the respective state courts and not by this Court. This Court should not grant certiorari in this case and thereby intrude into matters of local government traditionally reserved for local control.

2. The Petitioners Have Not Raised a Substantial Federal Question Under the "Takings Clause."

The Petitioners argue that the Takings Clause (U.S. Const. amend. V, cl. 4) has been violated by the Washington court's decision. First, no unconstitutional taking of private property has occurred in this case. This case simply involves a state court's determination of the validity and enforceability of certain municipal contracts. Further, the participants have not effected an unconstitutional taking of the bondholders' property. This is demonstrated by the fact that no participant has ever received any property of the bondholders or assets purchased from proceeds of the bonds as a consequence of the Participants' Agreement or the sale of

bonds by the Supply System.[7]

To constitute a compensable taking, there must be an invasion of existing private property rights by a governmental entity which causes a diminution in those rights. See Webbs' Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

In this case, the value of the bondholders' investments was affected by a reasoned judicial determination, based

---

7 This case involves only the enforceability of the Participants' Agreement. As is briefly referenced by Petitioners, Petition at 13-14, extensive litigation independent from this case related to the Supply System's default on the WNP 4 and 5 bonds presently is pending in both federal and state courts. Claims brought on behalf of the bondholders based on securities fraud, misrepresentation, negligence and other grounds against the Supply System, the participants, bond counsel, underwriters, attorneys for the Supply System and participants, contractors and others remain to be determined. The Washington Supreme Court's decisions in Chemical Bank I and II have not left the bondholders without avenues of redress for their investments in the Supply System.

upon a consistent application of Washington state law, that the Washington municipal participants had no authority to enter into the Participants' Agreement. The Washington court's decision was that the Participants' Agreement was invalid ab initio with respect to the Washington municipal participants. To accept Petitioners' Takings Clause arguments would require this Court to abolish the long-standing doctrine in Washington State that acts of political subdivisions of the state are limited by the authority granted to the subdivisions by the state.

The Petitioners' contentions notwithstanding, the Washington Supreme Court has not "engaged in . . . retroactive munipulations of state law to 'transform private property into public property without compensation'." Petition at 18. Although the validity of municipal obligations

precisely like those created by the Participants' Agreement had not previously been adjudicated by the Washington Supreme Court, the court applied existing Washington state law in a reasoned manner to determine whether the Washington participants had authority to enter the Participants' Agreement. The decision of the Washington court as to the municipal authority of the Washington participants did not overrule a single prior decision.

The Washington court's denial of restitution to the bond holders does not constitute an unconstitutional "taking." The participants, including Respondent City of Ellensburg, have not themselves received any benefits from the bondholders' investments. The Supply System sold the WNP 4 and 5 bonds, and the proceeds therefrom were paid directly to the Supply System which is a separate municipal corporation formed pursuant to Washington

statute. None of the proceeds from the bond sales have been paid to any participant. See Chemical Bank II, Appendix A at 38.

Because the participants have received no bond proceeds or assets, there is no meaningful or practical way to require restitution of the bondholders' funds by the participants without indirectly requiring performance of obligations which the Washington municipal participants were without authority to undertake. It has long been the law in Washington that ultra vires municipal contracts cannot be enforced indirectly on equitable theories where a municipality had no legal power or authority to make the contract. Chehalis County v. Hutcheson, 21 Wash. 82, 57 Pac. 341 (1899).

Under Washington law, when a governmental entity acts beyond its power and enters into an unenforceable contract, the

courts will not require the costs of that contract to be passed on to the citizens unless the citizens have derived a tangible benefit from the contract. State v. O'Connell, 83 Wn.2d 797, 523 P.2d 872 (1974). Denial of restitutionary relief is a direct consequence of application of the ultra vires doctrine, the very purpose of which is to protect the public or other municipal constituents from unauthorized actions by municipal officials. State v. O'Connell, supra.

In summary, any losses which have been incurred by the WNP 4 and 5 bondholders were not a result of any governmental taking, but were an incidental consequence of the Washington Supreme Court's determination of the ultra vires character of the Participants' Agreement. A loss in value to property which occurs as a mere consequential incidence of valid governmental

action undertaken in the pursuit of substantial and important public ends is not a taking. See Armstrong v. United States, 364 U.S. 40 (1960).

3. The Petitioners' Assertions That They Have Been Denied Due Process Are Without Substance.

Petitioners attempt to meet this Court's strict standards for certiorari review by asserting that the decision below denied them due process or fair procedure in violation of the United States Constitution. Petitioners point to the three aspects of the decision which they claim violated their federal due process rights: (1) the lack of a full evidentiary hearing on the issue of whether the participants "controlled" the Supply System; (2) the reference by the Washington court to the Petitioners' opportunity to seek a judicial declaration of the validity

of the Participants' Agreement prior to sale of bonds for WNP 4 and 5 by the Supply System; and (3) the fact that certain justices of the Washington Supreme Court whom Petitioners claim had indirect interests in this litigation participated in the decision in this case. None of the Petitioners' contentions raises a substantial federal due process issue reviewable by this Court.

A. The "Control" Issue.

The Petitioners make much of their claim that their due process rights were violated because they were denied a factual hearing on the issue of the participants' "control" of WNP 4 and 5. This claim is without merit.

In Chemical Bank I, the Washington Supreme Court properly held as a matter of law that RCW 35.92.050 requires Washington municipalities to have an ownership interest

in electrical generation facilities with respect to which the municipalities incur financial obligations. "[T]his court has never found authority for a project in which the participants did not have an ownership interest." Appendix B at 12.

It is undisputed that the participants did not have an ownership interest in WNP 4 and 5. However, rather than simply concluding that the absence of an ownership interest precluded enforcement of the Participants' Agreement as to the Washington municipal participants, as would have been required by existing Washington law, the court in Chemical Bank I examined the extent of the participants' control of the projects to determine whether it was sufficient "to constitute the equivalent of an ownership interest," such that the "ownership" requirement of RCW 35.92.050 might be satisfied. Appendix B at 14. After examining the Partici-

pants' Agreement and the record in detail, the court concluded that the participants did not have sufficient control of the projects to constitute the equivalent of ownership and, therefore, that the lack of an ownership interest by the participants in WNP 4 and 5 could not be remedied by resort to the "control" analysis.

Petitioners' federal due process rights were not violated by the fact that the Court went beyond its initial determination, unchallenged by Petitioners, that as a matter of law the participants' interests in WNP 4 and 5 lack several important indicia of ownership to analyze the "ownership" requirement of RCW 35.92.050. This aspect of the court's decision was an attempt to find some basis, albeit not supported by Washington precedent, to uphold the Participants' Agreement. Further, assuming that "control" alone

could substitute for the statutory requirement of ownership, the court's interpretation of the legal effect of the participants' control of WNP 4 and 5 under the Participants' Agreement was a valid exercise of the court's power to determine questions of law raised by Petitioners' suit to enforce the agreement.

B. Availability of Declaratory Judgment Action.

Petitioners' contention that they were denied due process as a result of the Washington court's reference in Chemical Bank II, Appendix A at 32, to the availability of a declaratory judgment proceeding to test the enforceability of the Participants' Agreements prior to the Supply System's sale of bonds is without merit. The Washington court's analysis of the ultra vires nature of the Participants' Agreements does not depend upon or require

the availability of a declaratory judgment action prior to the sale of the bonds.

The reference, in dictum, by the Washington court to the possibility that Petitioners could have sought a declaratory judgment does not raise a substantial federal constitutional issue.[8]

C. Recusal of Washington Supreme Court Justices.

Petitioners' third basis for their claim that they were denied due process is

---

8 In addition to a special declaratory procedure whereby validity of bonds issued by any municipal corporation may be tested by a taxpayer lawsuit, RCW Chapter 7.25, Washington law provides under its general declaratory judgments statute, RCW Chapter 7.24, that a person whose rights or legal relations are affected by a municipal ordinance or contract may have the construction or validity of the ordinance determined. RCW 7.24.020, 7.24.110. The "justiciable controversy" requirement of the declaratory judgment statute would almost certainly have been met if the "test case" had been brought in 1976 or 1977 in one of the several districts where environmentalist groups had already challenged the participation of local utilities on environmental grounds.

their allegation that Washington Supreme Court justices who were ratepayers of participants took part in the Washington court's decisions, thereby denying Petitioners an impartial tribunal. This claim also fails to raise a substantial federal constitutional issue.

Petitioners claim that two of the judges sitting on Chemical Bank I and one sitting on Chemical Bank II were ratepayers of WNP 4 and 5 participants who should have disqualified themselves from this case. Any interests in this case held by these justices were remote and indirect, arising from their status as ratepayers of the participants. Such remote, indirect interests do not require a judge to disqualify himself or herself from a case.

In ruling that a federal district court judge was not required by 28 U.S.C. § 455 to disqualify himself from a case having a potential effect on natural gas

rates in his community, the Tenth Circuit Court of Appeals noted that "[A] remote, contingent benefit, such as a possible beneficial effect on future utility bills, is not a 'financial interest' within the meaning of [28 U.S.C. § 455]" requiring disqualification from a case. In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794, 796 (10th Cir. 1980). In reversing the district court's decision disqualifying himself, the court noted that no disqualification is required where a judge's potential interest in a case is that shared by the judge in common with the general public.

The interests in this case of the Washington justices who may have been ratepayers of participants was that of members of the general public served by the participants. Such an indirect interest does not require disqualification of a judge.

Petitioners' reference to the disqualification of all the federal district judges in the Western District of Washington from litigation in the federal courts related to the Supply System's default on the WNP 4 and 5 bonds is irrelevant to their assertions in this case. District court judges from states other than Washington were available to hear the cases involved; only Washington state judges could hear the appeal in this case.

This Court has acknowledged that the disqualification of even those judges having direct pecuniary interests in a case is not required where such disqualification would interfere with a court's ability to decide a case. In United States v. Will, 449 U.S. 200 (1980). There, this Court held that the common law Rule of Necessity, consistently applied in both state and federal courts, required the Court to decide the case despite the direct financial interests of its Justices, where the case otherwise could not be heard.

Petitioners were not denied an impartial tribunal in this case.

CONCLUSION

This case does not involve any substantial federal questions. The Petition for Certiorari should be denied for the reasons set forth above.[9]

RESPECTFULLY SUBMITTED this 5th day of April, 1985.

Hugo E. Oswald, Jr.*
James A. Miller
Margaret A. Pageler

Jones, Grey & Bayley, P.S.
3600 One Union Square
600 University
Seattle, Washington 98101

Counsel for Respondent City of Ellensburg, Washington

*Counsel of Record

---

9 Additionally, the Petition for Certiorari submitted herein by Haberman, et al. should be denied for the reason that the question presented there also fails to raise any substantial federal questions. See footnote 1, supra.